Case and Comment.

NOTES OF

RECENT IMPORTANT, INTERESTING DECISIONS.
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CASE AND COMMENT.

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Punctuation in the New Tariff Law.

The amusing profundity of men who are able to pass final judgment on all things earthly or otherwise as soon as they drop into an editorial chair was well illustrated in the multitude of recent editorials as to the astounding results of mistakes in the punctuation of the new Tariff Law. From these it would appear that the plain intent of Congress had been entirely subverted by a mistake in the use of commas, colons, and other small points which in Lord Timothy Dexter's book were all dumped at the end. All this sounded sufficiently sensational, as well as learned; but the profound and learned articles look somewhat ridiculous when placed beside the head-note of Mr. Justice Harlan, to the case of Hammock *v.* Farmers Loan & Trust Company, 115 U. S. 77, 26 L. ed. 1111, stating that "punctuation is no part of a statute." The opinion in the case amplifies the proposition, and supports it by earlier authorities stating the general rule to the effect that for the purpose of arriving at the real meaning and intention of the law-makers the courts will "disregard punctuation or re-punctuate, if need be, to render the true meaning of the statute."

People of Color.

The lively present interest in the affairs of China and Japan sharpens attention to the recent decision by the United States Circuit Court in Massachusetts, 62 Fed. Rep. 126, which denies that a native of Japan can become a naturalized citizen of the United States. The decision is in effect the same as that made in respect to a Chinaman some years ago by Judge Sawyer, in the United States Circuit Court (5 Sawy. 155), and also that of the Supreme Court of Utah, in the case of *Re* Kanaka Nian, 4 L. R. A. 726, which decided against the naturalization of a native of the Hawaiian Islands So the city court of Albany, N. Y. decided in *Re* San. C. Po., 7 Misc. 471, against the naturalization of a dark yellow native of Burmah although he was an educated physician. These cases all agree that Mongols or Malays are not "white persons," within the meaning of the act of Congress on this subject. In *Re* Camille, 6 Fed. Rep. 256, a similar decision was made as to a half-breed Indian born in British Columbia. Our national colors must be plain under the present statute which allows none to be naturalized except white persons and those of African nativity, or descent. White, black, and a mixture of white and black are permissible but no rainbow colors. The eagerness of the Japanese for revision of treaties with western nations, especially to abolish consular courts in their country, is likely to be stimulated by this denial to them of what Europeans of every grade freely obtain.

A New Point in Extradition Cases.

An entirely novel decision in an extradition case has been recently rendered by Judge Davy, at the Special Term, Monroe County, New York. He declines to follow the opinion of Moore, in his work on Extradition, and that of Mr. Bayard while secretary of state, but holds, in opposition to their doctrine, that a fugitive extradited from a foreign country under the provisions of a treaty cannot be convicted of a minor offense for which he could

not have been extradited, although it may be included in the indictment as a lesser degree of the crime for which he was extradited. We believe the Judge is clearly right in his decision, notwithstanding the weight to which the opinions on the other side are entitled. The case has attracted much attention in the State Department at Washington, where, we understand, the soundness of Judge Davy's decision is regarded as unassailable.

Courts and Strikes.

Injunctions against strikers have stirred up so much interest, comment, and criticism that no little attention is due to the opinion of Caldwell, the Circuit Judge in the Circuit Court of the United States in the District of Nebraska, wherein he denies an injunction to prevent interference with property in the hands of a receiver of the court, or men in his employ. But this is not based on the lack of power in the court to punish such interference. On the contrary, it is expressly based on the declaration that no order of injunction can make such unlawful interference any more of a contempt than the law makes it without such order.

The court also gives as a reason against granting an injunction in such case that such orders have an injurious tendency because they tend to create an impression among men that it is not an offense to interfere with property in the possession of receivers or with the men in their employ, unless they have been specially enjoined from so doing. This, says the court, "is a dangerous delusion."

But while the power of courts to prevent such acts or punish them as contempt may be unassailable, the exercise of the power should certainly be limited to cases in which that remedy is the only one at all adequate. It is unfortunate that courts should be called upon to act in controversies which involve the strife of classes because of the danger that passion may lead to popular distrust of judicial fairness, and a belief that the courts are mere instruments of monopoly. May the occasions be rare in which such work of the courts may be necessary; and in the meantime may wise legislation provide other remedies.

Vaccination.

The question of compulsory vaccination is one of lively interest, at present, in the state of New York. A late Pennsylvania case and an earlier California case both hold that vaccination may be made a condition of the right to attend public schools, but we believe there has never been a decision in this country on the question of the power of the state to compel people to submit to vaccination against their will, although we understand that in Chicago, and perhaps elsewhere, compulsory vaccination has been actually enforced.

The compulsory education law in New York, coupled with the law requiring vaccination as a condition of attending schools, leave parents, who object to vaccination, only the alternative of sending their children to private schools. As the requirement of vaccination can be thus avoided by paying the necessary expenses of private schooling, the laws are doubtless fairly within the police power of the state, whatever may be true of a statute which absolutely compels people to be vaccinated. The question is by no means unimportant to many people who fear vaccination on account of the danger of serious results therefrom because they have known or heard of cases in which it left the victims mere wrecks. In not a few cases the remedy has been worse than the disease and many people have more deadly fear of it than of small pox. The constitutionality of a statute which should positively compel vaccination of all people will doubtless be tested, if such a statute shall be enacted. In England the omnipotence of parliament seems to have been acquiesced in as a matter of course, as the statute requiring all persons to be vaccinated, or furnish a certificate of vaccination, unless they have had small pox, has been tested in various applications; but the power to compel people to be vaccinated has been assumed without question.

Criminal Procedure.

Vigorous revision of criminal practice is one of the things now pressing to be done. Rules made to present injustice to the accused have become altogether too close a net work of protection for criminals. In the language of Chief Justice Dunbar of Washington: "The blind adherence by the courts to these old and now useless rules of construction has largely, and not without reason, impressed the minds of the common people with the idea that the administration of criminal law is a farce."

Index to Notes
IN
LAWYERS' REPORTS, ANNOTATED.

Book 24, Parts 1-3.

Mentioning only complete notes therein contained without including mere reference notes to earlier annotations.

The part containing any note indexed will be sent with CASE AND COMMENT for one year for 75 cents.

Among the New Decisions.

Constitutional Questions.

The fact that a telegraph cable company has accepted the provisions of the Act of Congress giving it the privilege of operating a line over post roads, is held in a recent Maryland case, Postal Telegraph Cable Co. *v.* Baltimore, 24 L. R. A. 161, to give it no right of exemption from a tax under a city ordinance of $2.00 on each pole in the public streets. This case raises the question of the power of states to control or impose burdens upon interstate telegraph and telephone companies and all the authorities on this subject are presented in the annotation to the case.

Another constitutional question is presented in a California case, *Ex parte* Sing Lee, 24 L. R. A. 195, which decides that an ordinance prohibiting public laundries, except in two designated blocks of the city, unless a license is obtained, which can be had only with the written consent of a majority of the real estate owners in several adjoining blocks, is unconstitutional. The court says: "The personal liberty of a citizen and his rights of property cannot themselves be invaded under the disguise of a police regulation." An extensive review of the cases touching the validity of licenses which are made to depend on consent of neighboring property owners, may be found in the annotation of the case of St. Louis *v.* Russell, 20 L. R. A. 721.

Among the constitutional cases affecting municipal corporations, is the West Virginia case of State, *ex rel.* Thompson *v.* McAllister, 24 L. R. A. 343, upholding a statute which requires members of municipal councils to be free-holders, although no such qualification is prescribed by the constitution which merely provides that "no person except a citizen entitled to vote shall be elected or appointed to any office, state, county or municipal." The court cousiders that adding further qualifications is consistent with this restriction.

The final establishment by ultimate authority of the nullity of administration of the estate of a living person is found in Scott *v.* McNeal, 154 U. S. 34, 38 L. ed. 896, which, reversing the decision of the Supreme Court of Washington, holds that the constitutional right to due process of law is violated by administering the estate of a living person without notice to him; and that notice to those who would represent him, if he were dead, is not notice to him. This decision must be regarded

as overruling the much criticised case of Roderigas *v.* East River Savings Bank, 63 N. Y. 460. It was pointed out in the annotation in 18 L. R. A. 243, where the cases on the subject of collateral impeachment of probate findings on jurisdictional facts were presented and compared, that while the findings of other jurisdictional facts are conclusive, it is otherwise as to the fact of the death of the party whose estate is in question, because of the lack of due process of law in depriving him of his estate without notice.

The claim of a right to practice Christian Science as a physician, without any license, on the ground that it is done as an act of worship, or a matter of conscience, is very effectually disposed of in State *v.* Buswell, 24 L. R. A. 68. The court vigorously turns against the defendant the scriptural condemnation upon attempts to make merchandise of divine gifts.

The general rule restricting the constitutional provision against *ex post facto* laws to those affecting criminal cases, has an apparent exception in the Colorado case of French *v.* Deane, 24 L. R. A. 387, in which the statute providing for punitive or exemplary damages is regarded as in the nature of a provision to punish crime, and, therefore, an *ex post facto* law, so far as applied to existing causes of action.

Streets.

The greatly increased value of property rights of abutting owners in city streets, which has grown up at the same time that numerous new uses of the streets have developed, is giving rise to very many important cases as to such rights. The building of a viaduct over railroad tracks in a public street, substantially closing access to abutting property, is held to entitle the owner to consequential damages under the Colorado constitution, although the courts of that state, by rule peculiar to them, have limited the provision as to damages to cases of unusual or extraordinary use. Pueblo *v.* Strait, 24 L. R. A. 392.

In Maryland, the erection of an elevated railroad abutment in a street, substantially destroying access to abutting property, is held not to constitute a "taking" of such property, but, under the statutes of the state, the owner of the property has a remedy for his damages. Garrett *v.* Lake Roland Elevated R. Co. 24 L. R. A. 396.

Another Maryland case denies the power of city authorities to close up a public alley, by an ordinance, in order that it may be turned to private use. Van Vitson *v.* Gutman, 24 L. R. A. 403.

A recent case in Chicago holds that a bridge or over-head crossing over a public alley, made for private use, cannot be allowed by the city authorities, even where the fee of the alley belongs to the city; and that the obstruction to light and air for the premises of an abutting owner farther from the entrance to the alley may be special damages, giving him the right to an injunction. Field *v.* Barling, 24 L. R. A. 406.

Special assessments of abutting property to pay for street sprinkling are held constitutional in the case of Chicago *v.* Blair, 24 L. R. A. 412, which is directly in conflict with a Minnesota case on the same subject. The cases on the right to impose on abutting owners the duty or expense of sweeping and cleaning streets or sidewalks, as well as of sprinkling, are considered in a note to the case.

Foreign Corporations.

Among the most interesting and important questions which arise in respect to foreign corporations, are some decided in recent cases. The legal capacity of a foreign corporation to bring suit outside of the state in which it was incorporated has come to be assumed without question; but the point is directly decided in Cone Exp. & Com. Co. *v.* Poole, 24 L. R. A. 289, and the general question of recognition or exclusion of foreign corporations is fully discussed in a note to the case.

The right of a Guaranty or Accident Lloyd's Association formed in another state to do business in Ohio is denied under the Ohio statutes on the ground that such association is in substance a corporation, or is attempting to act as a corporation. State, *ex rel.* Richards *v.* Ackerman, 24 L. R. A. 298. Quo warranto proceedings to oust the association from the exercise of such a franchise were sustained. With this case is a note on the restrictions upon business of foreign insurance companies.

When the business of a foreign corporation is in the nature of interstate commerce, its right to come into a state presents another question which is presented incidentally in Kindel *v.* Beck & Pauli Lithographing Co., 24 L. R. A. 311, and all the cases touching the exclusion of foreign corporations as an interference with interstate commerce are considered in the note thereto.

Where foreign corporations are prohibited to do business in a state until they have complied with certain conditions, it becomes an

important question whether or not contracts which they make without complying with such conditions are valid. Such a contract is upheld in Edison General Electric Co. *v.* Canadian Pac. Nav. Co., 24 L. R. A. 315. The conflict of the authorities on this question is clearly shown in a note to the case which also shows that a considerable majority of the decisions are to the contrary effect.

Another question of no small importance is that of the right of foreign corporations to own real estate. The New York case of Lancaster *v.* Amsterdam Improvement Co., 24 L. R. A. 322, fully establishes the right of a foreign corporation in New York to own or to deal in real estate, or to any other lawful business which a nonresident, natural person can do. This is probably the most important case on the subject. It substantially eliminates the doctrine of *ultra vires* from the subject of foreign corporations. In a note to the case the decisions as to ownership of real estate by such corporations, are fully reviewed.

Carriers.

The validity of statutes to prevent ticket brokerage or scalping has been in question in two recent cases; one in Illinois, Burdick *v.* People, 24 L. R. A. 152; and another in Minnesota, State *v.* Corbett, 24 L. R. A. 498, both of which uphold the statute. The few other decisions on the subject are found in a note to the Burdick case.

The claim of a railroad company that the congregation of hotel runners, hackmen, etc., in front of a station constituted a nuisance, is disposed of in Pittsburg, Fort Wayne & Chicago R. Co. *v.* Cheevers, 24 L. R. A. 156, on the ground that the railroad company has no private remedy, although its business may be remotely affected by the consequent annoyance to passengers.

Monopoly.

The anti-monopoly law of Congress is held inapplicable to a monopoly of the business of refining and selling sugar in the United States, on the ground that this is not foreign or interstate commerce. United States *v.* Knight, 24 L. R. A. 428.

Fraud.

While there can be little new in cases of fraud, much interest attaches to a case in which large quantities of goods had been fraudulently obtained by a Chicago Shoe Company, which carried on a business of purchasing without intent to pay. The chief interest in the case is in the remedy obtained against subsequent purchasers, who were held chargeable, under the circumstances, with knowledge of the fraud. Morrow Shoe Mfg. Co. *v.* New England Shoe Co. 24 L. R. A. 417.

Contracts.

The statute reducing the rate of interest is held in the Washington case of Union Savings Bank & Trust Co. *v.* Gelbach, 24 L. R. A. 359, to be inoperative as to interest on a county warrant which is by statute to draw "legal interest," after indorsement of nonpayment for want of funds. The court adopts the theory that the rate which first begins to run upon it is part of the contract obligation.

A contract to mine ore at a certain price per ton "so long as we can make it pay," is held in Davie *v.* Lumberman's Mining Co., 24 L. R. A. 357, to be too indefinite to authorize an allowance to one party for prospective profits in case the other party stops work.

The question whether or not a deed of trust for a portion of one's creditors will become operative, so as to take priority of an attachment, when they have no knowledge of it, is decided in the negative in Alliance Milling Co. *v.* Eaton, 24 L. R. A. 369, and a very extensive note to the case presents the authorities on this question of necessity of acceptance of an assignment or deed of trust for creditors.

Fireworks.

A city is held liable for the explosion of fireworks on the streets, under a permit of city officers, in the Arizona case of Fifield *v.* Phœnix, 24 L. R. A. 430. This case is contrary to the New York case of Speir *v.* Brooklyn, 24 L. R. A. 641, but is more in harmony with other decisions found in a note in 16 L. R. A. 395, as to liability for injuries caused by discharge of fireworks.

The Humorous Side.

Evidently thinking a good rule should work both ways, a Pennsylvania lawyer, in a brief as to rights in minerals below the surface of the ground, stands a dignified legal maxim on its head as follows: "This is really a case for the application of the great maxim relating to lands and to property, *cujus est solum ejus est usque ad cœlum*, which in the revised version reads, so far as our case is concerned, *cujus*

est solum ejus est usque ad Sheolum." One is tempted to call him a "daisy," but then "a daisy always looks upward."

A Judge, not old in years, whose growing family includes a late arrival, somewhat startled the audience in a church where a *viva voce* subscription was being taken, after he had made pledges in the name of each of his older children and one for the baby not yet named, by announcing still another, the payment of which he agreed to guarantee, for "John Doe."

One of the prominent lawyers of Rochester has a model client. She is an Irish woman. When asked recently if she didn't worry about her property interests in these uncertain times, she said "No, not at all. I have trusted everything to Father O'Hare, Mr. McGuire and God, and I feel perfectly safe." While the lawyer's modesty may make this somewhat unexpected association embarrassing to him, he must admit that her confidence is well placed,—at least in part. A lady who told the story, said she had never before known a lawyer to come between a clergyman and his Maker.

During a late prohibition convention, says an Oswego paper, "there were 22 delegates present, beside 10 or 12 outsiders embracing several ladies." Although this is mentioned as the largest convention ever yet held by the prohibition party in that county, they may look out in the future for a rush of outsiders.

The unconstitutionality of judicial moonshine seems to be established by the opinion of Chief Justice Ryan, in 39 Wis. 390. We quote from it the following astronomico-constitutional disquisition in reference to the exercise of judicial functions by a counselor at law acting by consent of the parties: "There is a quaint relish of poetry in the way of putting the sovereign delegation of judicial function in Martin *v.* Marshall, Hob. 63. 'All kingdoms in their constitution are with the power of justice, both according to the rule of law and equity; both which, being in the king as sovereign, were after settled in several courts; as the light, being first made by God, was after settled in the great bodies, the sun and moon. But that part of equity being opposite to regular law, and in a manner an arbitrary disposition, is still administered by the king himself and his chancellor, in his name *ab initio*, as a special trust committed to the king, and not by him to be committed to any other.' With all deference to that great judge, it might perhaps be suggested that here is a slight inaccuracy of constitutional law, celestial and terrestrial. For there does not appear to be any radical distinction in the delegation of equitable jurisdiction and of legal jurisdiction. Equity never rested in mere discretion of king or chancellor. And it is certainly contrary to the received notion, that the moon shines as a luminary *per se*, like the sun. Taking the sun and moon according to the common acceptation, and following Hobart's metaphor, the circuit judge might be likened to the sun of the court below, in this cause, and Mr. Cole to the moon, after the fashion of a juridical depute in Scott's law, shining with delegated jurisdiction. But the constitution mars the comparison. For by the astronomical constitution the sun appears to take power to delegate his functions of lighting the world; while the State Constitution tolerates no such delegation, and appoints a sun only, without any moon, as luminary of the Circuit Court, whose 'gladsome light of jurisprudence' must be sunshine only, not moonshine."

MISCELLANY.

There is a certain flavor of old times in the provision of the Constitution of Massachusetts (part 2, chap. 3, art. 5), that "all cases of marriage, divorce, and alimony . . . shall be heard and determined by the *governor and council* until the Legislature shall by law make other provision."

A novelty in court practice, so far as we are informed, was the calling of a jury of lawyers to determine challenges to judges of the Supreme Court. This was done in New Jersey, while the Act of 1806 was in force, which made it a cause of challenge to a judge that he had already passed on any question in the case. The Act was repealed in 1820. In the case of Den. Pearson *v.* Hopkins, 2 N. J. L. 195, every judge on the bench was challenged, but the challenges were severed and tried one at a time.

A quaint expression is used by Holt, *Ch. J.*, in Salkeld, 366, where he says: "The mayor of Hertford was *laid by the heels* for sitting in a case wherein he himself was lessor of the plaintiff, though he, by the charter, was sole judge of the court."

Chief Justice Black, of Pennsylvania, once forcibly illustrated the rule as to repetition of actions by saying: "When the thing has but one neck, and that is cut off by one act of the defendant, it would be mischievous to drive the plaintiff to a second, third or fourth action, as the successive consequences of the wrong may arise."